No. 14854

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

EARL WEST, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The district court wrote a memorandum opinion which appears at R. 26.

JURISDICTION

The jurisdiction of the district court was invoked by the United States as plaintiff under 28 U.S.C. sec. 1345. The judgment of dismissal was entered March 23, 1955 (R. 35). Notice of appeal was filed May 18, 1955 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the Tribal Council of the White Mountain Apache Indian Tribe has the power, by virtue of its con-

stitution and duly enacted and approved ordinance, to exclude white men from grazing on the ranges within the borders of the White Mountain Apache Indian Reservation, and to regulate grazing by members of the Tribe.

STATEMENT

This action was instituted on May 19, 1954, to enjoin appellees, Earl West and his family, from grazing livestock on tribal lands in the White Mountain Apache Indian Reservation, Arizona. The land belongs to the United States and is held in trust for the Tribe. The facts, as brought out at the trial, leading up to the filing of the complaint are as follows:

On August 15, 1938, the White Mountain Apache Tribe, in accordance with Section 16 of the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. sec. 476, adopted a constitution and by-laws (R. 41-55). This constitution in Article VIII makes the following provision relative to tribal lands:

> The general control of the reservation lands and other tribal property shall continue as heretofore, until changed in any particular by ordinance. The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in severalty, but assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject, provided the vested rights of members of the tribe are not violated. Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.

On August 3, 1953, the tribal council enacted an ordinance known as Ordinance No. 22 which was approved by the Superintendent of the Fort Apache Agency and the Assistant Secretary of the Interior. It became effective August 7, 1953 (R. 10-17). Article I of the Ordinance provides for the establishment of grazing districts in the reservation. In each of these districts grazing associations may be formed by the people in the districts and grazing permits will be issued only to members of the associations. Penalties for grazing without proper permit are provided by Article II (R. 14).

Article III of this Ordinance provides in part (R. 15):

> This ordinance shall apply to all lands within the Fort Apache Indian Reservation as defined in Article I of the Constitution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, approved August 26, 1938, *Provided,* That the rights accruing to members of the Tribe under Article VIII of the Constitution are not hereby jeopardized or abrogated in any way, and *Provided Further That,* right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this ordinance and nothing in this ordinance shall affect adversely the rights of individuals to their home sites or dwelling places.

Article III then provides the procedure for assertion of claims as to improvements. Appellee, Earl West, has grazed livestock on some 30,000 acres of tribal land within the Fort Apache Indian Reservation, Arizona, since about 1923. West is not an Indian but is married

to appellee Elsie Amos West, who is a member of the White Mountain Apache Tribe. The remaining appellees, their children, are either enrolled members of the Tribe or eligible for enrollment (R. 30). Earl West being a non-Indian is not eligible to apply for membership in a livestock association as contemplated by Article I of Ordinance 22. His wife and children (other than the two who are minors) are eligible to apply but have not done so (R. 33). Since appellees continued to graze this portion of the reservation contrary to this Ordinance, the present suit was brought to enforce the Ordinance and to enjoin such grazing.

The case came on for trial on December 3, 1954. At the trial Mr. Moore, a former stockman on the reservation, and Mr. Donner, former superintendent of the reservation, testified regarding the meetings between West and officials of the reservation in which West was permitted to locate on portions of the reservation. The principal meeting was in 1936. Mr. Donner testified under cross-examination that "there was nothing permanent about giving any one man certain acreage he could keep regardless of the number of people in the tribe, nobody expected that" (R. 125). West and his family testified regarding certain improvements he had made on the range (R. 132). He also testified that the cattle belonged to him and his wife and that the children owned some of the cattle individually although they carried the brand listed in his name (R. 139).

At the trial the Government introduced two witnesses, John Crow, present superintendent of the reservation, and Joe A. Wagner, a range conservationist with the Bureau of Indian Affairs. Mr. Crow testified that West was grazing on this land against the wishes of the tribal

council (R. 81) and that in the summer of 1953 West met with the council to work out some arrangements regarding his grazing on tribal property. At this meeting West offered to move if the council would buy him a ranch of comparable size outside the reservation and, in the alternative, he asked that members of the tribe of less than full blood be allowed to form their own grazing associations. The council refused both suggestions (R. 69-70, 85). It was after this meeting that letters were directed to West requesting him to show what right he had to graze cattle on the reservation. Mr. Crow testified that the range was in very poor condition and when he saw the condition of the range and the poor condition of the cattle he of his own volition impounded the cattle (R. 96).

Joe A. Wagner, a range conservationist, testified that he was familiar with the range involved here, that the range was in poor condition and that in 1952 he had recommended nonuse of the area for five years.

At the conclusion of the trial the court entered a memorandum opinion in which it states that the Wests had acquired rights within the meaning and protection of Article VIII of the tribal constitution and "Such rights may be modified by the tribal council, as the superintendent might have modified them, to accommodate the needs and interests of other families on the reservation, but they could not be entirely abrogated except for a compulsory membership in a livestock association" (R. 26). On March 23, 1955, the court entered its findings of fact and conclusions of law and entered judgment dismissing the complaint (R. 27). This appeal followed (R. 36).

STATEMENT OF POINTS TO BE RELIED ON

1. The district court erred in interpreting that provision in Article VIII of the Constitution of the White Mountain Apache Tribe which protects "rights of occupancy of long established allocations" to allow a non-Indian to enjoy exclusive grazing privileges on tribal lands.

2. The district court erred in holding that Ordinance No. 22, duly enacted by the tribal council, is ineffective regarding the rights in tribal lands to be enjoyed by a non-Indian.

3. The district court erred in entering judgment of dismissal of the plaintiffs' complaint.

ARGUMENT

The Council of the White Mountain Apache Indian Tribe Was Authorized to Exclude White Men From Grazing on the Reservation

It must be assumed that Mrs. West and the West children may, if they wish, become members of the livestock association. The district court recognized that the alleged "right" might be abrogated in exchange for a compulsory membership in a livestock association. Its holding was, therefore, that West's right could not be so abrogated since he was ineligible to join the association and that this fact rendered the Ordinance invalid as to the entire West family. We shall show first that limitation of this use of the reservation to Indians was perfectly permissible, and second, that regulation of grazing upon the reservation through the association's process was an appropriate means of dealing with the problem.

A. *The use of the tribal lands was properly limited to members of the tribe.*—Earl West has no possible claim

to grazing rights, exclusive or otherwise, under the Federal Constitution. Article VIII of the Tribal Constitution does not help him since it protects "the vested rights of members of the tribe * * *." Limitation of the benefits of the tribal property to members of the tribe is obviously reasonable. And, of course, Mrs. West and the children have their rights, which they have not exercised, to enjoy the tribal property through membership in the association. Certainly this white man can not indirectly secure the benefits of tribal membership simply by marriage to an Indian, which seems to be implied in Conclusion of Law No. 3 that all of the property of Earl and Elsie West is community property. At most that fact would give Earl West only a share in Elsie's tribal interest and not a right to reject tribal control of its property. The district court thus plainly erred in holding that Earl West possessed any right in this property owned by the Indian Tribe. Certainly, West had no greater rights than Indain members of the tribe and, as we shall now show, the tribal regulations of grazing were perfectly proper as applied to members of the tribe.

B. *The tribal grazing regulations are perfectly proper as applied to members of the White Mountain Apache Indian Tribe.*—The lands here involved, are within the Fort Apache Indian Reservation and have been "reserved for the use and benefit of the White Mountain Apache Tribe" (Fdg. 1, R. 28). The purpose of establishment of the tribal organization under the Wheeler-Howard Act was primarily to regulate the use of the tribal property in the interests of all of its members. It is clear that no individual had a right in such property which would be protected by the Fifth

Amendment of the Federal Constitution, merely because he had been permitted to use the property for grazing or other purposes in the past. Such use could not, under any view, attain a greater dignity or protection than the implied license arising from the similar use of public domain. Prior to the passage of the Taylor Grazing Act, 48 Stat. 1269, cattlemen had an implied license to graze their cattle upon the open and unreserved public domain. *Buford* v. *Houtz,* 133 U.S. 320, 326 (1890). This implied license, however, was not a property right. As the court stated at page 326 this license existed only if no "act of government forbids this use." The Supreme Court in a later case, *Omaechevarria* v. *Idaho,* 246 U.S. 343, 352, states "Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used;" citing *Buford* v. *Houtz, supra.* And, in the *Omaechevarria* case (246 U.S. at page 352), the Supreme Court points out that, because the citizen possesses no such property right, the license can be withdrawn or revoked by the Government. Citing *United States* v. *Grimaud,* 220 U.S. 506 (1910), and *Light* v. *United States,* 220 U.S. 523 (1910). Congress did revoke the license by the passage of the Taylor Grazing Act. And licenses issued under that Act do not create vested rights in the federal grazing lands. *Osborne* v. *United States,* 145 F. 2d 892 (C.A. 9, 1944); *Oman* v. *United States,* 195 F. 2d 710 (C.A. 10, 1952).

Thus, the only possible basis for a claim to a vested right to graze on the reservation is the Tribal Constitution. Ordinance No. 22 is, of course, premised upon the understanding that grazing rights arising merely

from previous use are not vested rights within the meaning of the Tribal Constitution and Article III expressly so states, *supra,* p. 3). The appropriate officials of the Department of the Interior approved this Ordinance, thereby agreeing with the interpretation of the Tribal Council. This construction should, we submit, conclude the matter.

Moreover, the council's construction of the Tribal Constitution was clearly correct. Article VIII refers to "Right of occupancy of long established allocations or dwelling places and improvements * * *" (*supra,* p. 2). This is the normal language by which to refer to the allotment of areas continuously occupied as homes, or as farms and gardens and not to vast areas used for grazing. The fact that, almost contemporaneously, the Federal Government in attacking the problem in the Taylor Grazing Act refused to recognize vested rights in any particular area further confirms the council's construction. A conclusion that grazing rights are within the scope of Article VIII would largely nullify any control of grazing since, as is well known, the great problem of recent years, has been overgrazing. For this reason, the Secretary of the Interior has promulgated grazing regulations by authority of Section 6 of the Wheeler-Howard Act, Stat. 984, 986. Section 71.4 of these regulations, 25 C.F.R. 71.1 *et seq.,* states that they would be effective on any Indian lands under the jurisdiction of the Bureau of Indian Affairs except when they were superseded "by special instructions to particular reservations or by provisions of any tribal constitution, bylaws, heretofore or hereafter ratified, or any tribal action authorized thereunder." Section 71.4 establishes divisions of the reservation into

grazing units and section 71.9 recognized that grazing associations may be formed and free grazing privileges are accorded such associations.

It is unreasonable to construe this particular constitution to exclude this generally acceptable regulatory process. The usual problem was here present. At the trial government witness Wagner testified that in 1952 when he inspected the area involved here he recommended nonuse of the range for five years (R. 103). The general area had suffered from drought for some time and forage on the range was sparse. Mr. Wagner testified that the range was in poor condition (R. 102). Clearly some control of the range was necessary.

It is not for the court to attempt to solve the problem in another way by saying that, although vested, the grazing rights might be modified "to accommodate the need and interests of other families on the reservation" (R. 26-27). If rights are in truth vested within the meaning of Article VIII they cannot be modified and, of course, the court may not amend the Constitution. We submit that this grazing situation fits exactly the provision of Article VIII that "assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject * * *." The claim arising from the making of improvements was recognized by the tribe and provision for the settlement of any claim which any member might have against the tribe is provided for in paragraph 2 of Article III. This paragraph provides that settlement of the claims shall be negotiated between the member and the council. If settlement is impossible at this level the matter would be referred to the Department of the Interior. Thus, any valid claims that the

West family as members of the tribe may have are protected by Ordnance No. 22.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the district court should be reversed.

Respectfully,

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